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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 21.

WARREN-BRADSHAW DRILLING COMPANY, PETITIONER,

VS.

O. V. HALL, INDIVIDUALLY, AND AS AGENT OF W. N. SLAID, EDGAR SLAID, E. S. MORGAN, A. D. HARMON, J. M. HUDDLESTON, J. R. MILLER AND B. R. GRAY, RESPONDENTS.

BRIEF FOR RESPONDENTS.

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INDEX.

Subject Index.

Authorities.

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To the Honorable Supreme Court of the United States:

STATEMENT OF ISSUES.

This case originated under the Fair Labor Standards Act. The question for decision is, do rotary drillers in the oil field working for an independent contractor, whose job it is to drill the well down to the producing strata but not into it, come within the protection of this act? The act applies to "employees engaged in interstate commerce or in the production of goods for interstate commerce." This case does not come within the first provision, but

it is our contention that these employees do come within Section 3-J of the act, which provides, "*Produced* means produced, manufactured, mined, handled, or in any other manner worked on in any state."

We think under all the authorities it is agreed that oil is a mineral, and producing oil is mining. Summers Oil & Gas, Section 135. In order to determine the answer to the question here, it is necessary to consider the particular business in which these people were engaged.

The point is urged here that because the petitioner was an independent contractor that the act would not apply. If that were true, the entire purpose of the act would be defeated by having all of the work done by independent contractors who would not have to respect the act.

STATEMENT OF FACTS.

Warren-Bradshaw Drilling Company was an oil well drilling contractor. It drilled oil wells for others in proven areas. Its manager knew the depth of the oil producing strata. It used a rotary rig to drill down to within a few feet of the oil producing strata then the rotary tools were pulled out and cable tools were installed and used to complete the hole. The appellees were all employed in the operation of the rotary tools.

The appellees were paid a regular daily wage, regardless of how many days per week they worked. Some weeks they worked less than the minimum hours and sometimes more. They were paid no over-time (R. 42, 47, 49, 53, and 58). In fact, there was no dispute on that phase of the case. The employer tried to keep the rotary running continuously. The employer used three shifts or tours per 24 hours and none of these

appellees worked more than 8 hours on any day but did work different numbers of days per week. When the machine was in operation they worked seven days per week. If the job was finished after they had worked one day in the week, they were paid the same daily wage as when they worked seven days per week. Over-time was never taken into consideration in calculating their pay.

The proof was undisputed that every well drilled by appellees was a producer (R. middle page 78). Eighty-five percent of the production moved in commerce (R. 109).

Some light is shed on this question by a consideration of the two methods used to drill these wells. A rotary drilling rig mainly consists of a rotating cutting edge called a bit, attached to a hollow drill stem, to which power is applied on the derrick floor and which is lengthened as the depth requires. Water under pressure flows down through the drill stem and up around it to the surface, bringing the drill cuttings. An advantage is the use of less casing, as the process seals off water with a mud wall. It is also a quicker and cheaper method in some formations. A disadvantage is that it may seal off the oil or drive it away from the hole.

The standard cable tool drilling rig utilizes a heavy bit suspended by a steel cable, which by raising and dropping the bit pulverizes the material in the bottom of the hole, and mixes it with water, which is removed from the hole by a bailer. The method is often slower. It may require a separate string of pipe from the surface to each water sand. But it does not seal off nor drive back the oil and is therefore preferred in wildcatting and in "drilling in" wells otherwise drilled by rotary rigs.

FIRST COUNTER-PROPOSITION.

The classification of a particular job in any industry is usually known by the classification given that job by the industry itself.

Statement and Argument.

The petitioner has presented two propositions. Its second proposition is that it paid what it should have paid. Your decision in paragraphs 13 and 14, *Overnight Motor Transportation Company vs. Missel*, expressly approved the decision of the Circuit Court of Appeals in this case on that question. We assume the Missel case settles that question in this court. We will therefore address our remarks to his proposition I.

You will take judicial notice of the method of handling the oil business by the industry. The oil companies divide the business into three branches and usually operate under three separate corporations. As an illustration, the Gulf Production Company, the Gulf Pipe Line Company and the Gulf Refining Company. The production company produces the oil and stores it on the lease. The pipe line company receives the oil at the storage tanks and transports it to the refineries. The refining company manufactures it. Every man who is employed and who produces oil is employed by the production company. Beginning with the digging of the slush pit all the way through the completion of the well, including the pumper who turns the oil into the storage tank, every employee is employed by the production company. If the petitioner's position in this case is correct, nobody in the production department would be engaged in commerce. The pumpers, if a flowing well, only open a valve and the oil flows into the line to a storage tank on the

lease. If the well is a pumper, the operator throws a switch and the pump starts and the oil flows into the line to a storage tank on the lease. When the oil has been put into the storage tank on the lease, it is then measured and turned over to the pipe line company for transportation and the pipe line pumper opens another valve and the oil is in commerce. Under our theory, every employee who has anything to do with the work of actually producing the oil, from digging the slush pit to and including the pumper who puts the oil in the storage tank, is engaged in the production of goods for commerce. In other words, oil cannot be produced without a derrick; oil cannot be produced without drilling the hole down to the production strata; and oil cannot be produced without setting a string of casing just above the production. If the drilling of the well down to the strata by the rotary is not within the statute, the casing crew that sets and cements the casing on top of the producing strata and has nothing further to do with the well, is not within the act. Neither would the crew that used the cable tools to drill in the well be within the act. The cable tool crew discovers but does not produce the oil. When oil is discovered, the well is shut in. No one in the production department would be under this statute.

The petitioner refers to dry holes that might be drilled by the rotary. The truth is that, rotary tools are rarely used for wildcatting in West Texas. The reason for that is that a rotary rig will mud off ordinary production, and it is with great difficulty that a real test of any area can be made with a rotary. Nearly all wildcat wells are drilled with cable tools. The reason for that is that the cable tools do not mud off production, and if production is encountered the operator will know about

it, whereas he might not know if he were using a rotary. The great majority of the wells drilled by a rotary do produce oil because the rotaries are used in proven areas to drill down to a specific depth, and there the well is stopped, pipe set and cemented, and a cable tool rig is set; and then the hole is drilled into the formation from which the oil is produced and the well shut in. We are giving you this information because probably not many members of the court have had any experience in drilling oil wells. Lawyers usually invest their money in dry holes.

The record, page 109, disclosed that eight-five percent or more of the oil moved in interstate commerce. The defendant's position was aptly stated by the trial court in the opening statement:

> "The Court: Then as I understand, your defense consists in the fact that Warren Bradshaw is just a contractor; that is really what it amounts to?
>
> "Mr. Settle: Yes, sir.
>
> "The Court: Wells, that if it had been drilling wells for yourself you concede that you would have been liable, if you produced oil?
>
> "Mr. Settle: Yes, sir. We also contend that, even though defendant wasn't subject to the requirements of the act, they did comply with the requirements of the act in that they paid these particular employees and all others far above the requirements of the act.
>
> "The Court: That is, if it be distributed over that period?
>
> "Mr. Settle: Yes, sir. In other words, that the act is a minimum wage act, and that they were paid far above the minimum wage requirements" (R. 13).

In other words, the defendant in this case has taken the position, because it was drilling these wells for someone else, that that relieved it from complying with the Fair Labor Standards Act. It is the contention of the plaintiffs that it makes no difference whether the original producer is the one who sends the oil across the state line or whether independent contractors intervene. The test, in our opinion, is whether the workman is engaged in producing goods that, when produced, were produced with the intention that such goods would move in commerce.

SECOND COUNTER-PROPOSITION.

Employees are engaged in the production of goods for commerce where the owner intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce.

Argument.

The test is, did the owner contemplate that the oil produced would move in commerce? We must keep in mind that the owner of the lease in one general operation drilled the wells and moved the oil in commerce. In order to get away from this act it is contended here by the petitioner that the intent of the independent contractor is controlling. The independent contractor could have no interest in the result of drilling the well. It was only the owner who was interested. In support of its contention that the independent contractor's intent would be controlling, a bulletin issued by the administrator is cited as authority, as well as the case of *Darby Lumber Company*, 312 U. S. 100. The petitioner insists that under this authority that the intention of the employer, the in-

dependent contractor, controls. The statute justifies no such conclusion. In the administrator's bulletin and in the Darby case the word "employer" was used synonymously with the word "owner." It is the act of producing the goods for commerce that is within the statute. If some segregated part of the work is done by an independent contractor it could in no way affect the ultimate purpose of the owner and it would be the intent of the owner that would control. The best evidence that the owner intended and believed that he would produce oil was the fact that he drilled the wells and paid the costs of the drilling, together with the result, which shows at page 78 of the record, that every well was a producer—one gasser and the balance oil, and the best evidence of the intention of the owner with respect to whether the goods were to be produced for commerce lies in the fact that eight-five percent of his available market was within interstate commerce provided for by pipe lines and interstate facilities, and plus the further fact that this oil actually went into interstate commerce.

This is not a case where the respective jobs are handled by separate owners and ultimately wind up in commerce, but it is one project under one ownership for one purpose and one conclusion and handled merely for convenience through so-called independent contractors who performed the several tasks assigned them by the owner for the common purpose.

This is not a case of an independent contractor in the sense that it is a completed independent undertaking, but it is a series of delegated tasks making up one project under the control of the owner.

That the owner intended for the goods to move in commerce is not open to question. He spent his money in order to produce oil, eighty-five per cent, of which he knew he would move in commerce. Every well drilled by the respondents was a producer, one gas well, all the others oil wells (R. 78). The operator knew that most all of the wells would produce in a proven area such as was involved here.

These operators expect every well they drill to produce. They also know that Texas produces one-third of the oil that is produced in these United States. Probably the greatest gas field in the world is in this immediate territory. The gas that is consumed in Kansas City and Chicago and intervening points comes from this field. The testimony of the Railroad Commission showed that eighty-five percent of all Texas oil moved in commerce. These drillers and everybody connected with this transaction knew that the oil fields of Texas supplied the demands of a large part of the world for petroleum products. Today our government has promoted and financed the building of the biggest pipe line in the world from the East Texas oil fields to Illinois. Right here in the city of Washington the people are limited in the use of gasoline. This twenty-four inch line will largely relieve that situation.

We think the statute itself answers the argument that the independent contract does only a part of the job and therefore not within the act, wherein the statute reads:

> "(j) 'Produced' means produced, manfactured, mined, handled, or in any other manner worked on in any state; and for the purpose of this act an employee shall be deemed to have been engaged in the production of goods *if such employee was employed*

in producing, manufacturing, mining, handling, transporting, *or in any other manner* working on such goods, or *in any process or occupation necessary to the production thereof,* in any state." (Italics ours.)

The argument that the petitioner could not be assumed to intend or expect the oil or gas would move in interstate commerce is wholly inconsistent with the common knowledge of every American school boy.

If the argument is sound that the intention of an independent contractor controls, then you have this situation: The slush pit and cellar are practically always dug by an independent contractor. The derrick is constructed by an independent contractor. Drilling the holes down to the producing strata is done by the independent contractor. The casing is run and cemented by an independent contractor. The cable tools are installed and operated by an independent contractor. Who is going to get the benefit of this act? Nobody but the pumper in the production department. The purpose of this act is not to help just one man but to help all the employees in that particular job.

It is contended that the bulletin issued by the administrator and the holding of this court in the Darby case put the construction on the word "employer" that petitioner seeks to apply here. There was no independent contractor in the Darby case. Neither was the administrator's bulletin dealing with an independent contractor. It is the intention of the owner that controls, not the intention of the independent contractor who dug the slush pit or who set the casing or who built the derrick or who operated the rotary tools. It is the entire job that controls, and that was all under the control of the owner. In other words, the independent contractor has no intention

about the matter one way or the other. What does he care so long as he gets his job done and is paid for it? It is the owner who is interested in the production.

WHEREFORE, we most earnestly insist that this case should in all things be affirmed.

Respectfully submitted,

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